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Supreme Court of the United States

October Term, 1958

No. 358

DE FONCE CONSTRUCTION COMPANY, INC., J. B. COOPER and MANUFACTURERS CASUALTY INSURANCE COMPANY,

Petitioners,

v.

THE CITY OF MIAMI, for the use and benefit of COMPLETE MACHINERY AND EQUIPMENT COMPANY, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

HARRY GROSSMAN,
Attorney for Respondent.
Office & P. O. Address,
No. 545 Fifth Avenue,
New York 17, N. Y.

LOEB APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0689.

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Statement of the Case

The petitioners have attempted in their Statement of the Case contained in their petition for a writ of certiorari to take certain testimony out of context. They have also tried to place a distorted and unfair interpretation on some of the testimony adduced during this long trial held before Hon. Emett C. Choate, United States District Judge, and a Jury. The petitioners still persist in discussing the insufficiency of the judgment in their favor, which judgment has not been appealed, and therefore cannot enter into the consideration of the petition now before this Court. In order to correct some of the statements made by petition-

ers, a few of the relevant facts adduced at the trial of this action will now be set forth, with specific references to the trial record, and with no attempt to delve into the minds of the Jury for the purpose of speculating as to what the basis or reason for their beliefs and findings may have been.

The only written agreement or contract between the parties herein was that of August 23, 1954 (R. 87-92). The only oral modification thereto was in regard to the grouting operation, whereby the respondent agreed to waive accrued rentals due from the petitioners up to the sum of $7,000.00. Even this modification was confirmed in writing by certain correspondence between the parties. The only other modification of said original agreement or contract between the parties was a sight draft arrangement in writing dated April 9, 1955, whereby the petitioners were to pay the respondent the sum of $36,000.00 on account of accrued rentals up to that date. Although said sight draft was to be consummated and in effect by April 11, 1955, the same was never honored or paid by the petitioners.

The testimony of even the petitioners' witnesses is eminently clear to the effect that after June 15, 1955, the petitioners took over the job completely and retained and detained all of the machinery and equipment belonging to the respondent until the latter part of December, 1955 and January, 1956. The testimony is also clear to the effect that during that five to six month period, the said machinery and equipment belonging to the respondent was left unattended, unused and not maintained at the foot of Northeast 79th Street and Biscayne Bay, Miami, Florida. An examination of the original Complaint (R. 30-41) as well as the Amended Complaint (R. 54-62) in this action, indicates that the petitioners at all times sought by means of an injunction, to enjoin and prevent the respondent from obtaining the return of its machinery and equipment.

Furthermore, the testimony and evidence adduced at this trial discloses that the petitioners admit that at least

$1,500.00 worth of equipment was not returned by them to the respondent because it was left in the ground (R. 346-348). There is also evidence to indicate that other badly damaged items were not returned (R. 886-888). In addition, the record contains exhibits which show the deplorable and useless condition in which some items were returned to the respondent.

The Trial Court, in its instructions to the Jury, to which no objections or exceptions were taken by either side, declined to allow any rentals to the respondent for the initial sixty-day trial period. However, for the period from June 15, 1955, the date upon which the petitioners admittedly took over full control of the job, up to January 13, 1956, the date when the last shipment of machinery and equipment was actually returned to the respondents, the Trial Court directed the Jury to find the reasonable rental value for the retention of said machinery and equipment. As to the period between November 9, 1954 and June 15, 1955, the Trial Court stated to the Jury that the rent for that period is in dispute (R. 1000-1001). In addition, the Trial Court directed the Jury to deduct $7,000.00 from any award in favor of the respondent, said sum representing its agreed share of grouting expense (R. 1010). The Trial Court also properly submitted to the Jury the question of what machinery and equipment was not returned to the respondent by the petitioners (R. 1000), as well as the claim for repairs and replacements in order to rehabilitate the machinery and equipment that was sent back damaged beyond the usual wear and tear (R. 1001).

In fact, a careful examination of the Charge of the Trial Court (R. 994-1013) as well as the additional instructions requested by the Jury (R. 1015-1025) clearly shows that none of the parties in this action had any additions, deletions, objections or exceptions to make to any of the Charges and Instructions made by the Trial Court to the Jury herein.

Reply to Questions Presented by Petitioners

The petition for a writ of certiorari herein poses seven (7) questions to be considered by this Court. The respondent hereby interposes the following reply to each of said questions presented:

1. This question charges the Court of Appeals with error in failing to consider petitioners' specifications of error, numbers 5, 7, 8 and 11. This question is best answered by the paragraph of Judge Hutcheson's opinion in this case, quoted on page "3a" of the petition for a writ of certiorari, which reads:

> "Of appellants' specifications of error Nos. 5, 7, 8 and 11, dealt with in their point two, appellee insists that these specifications come in the end merely to the contention that the evidence was insufficient to sustain the verdict and that, since no motion for a directed verdict was made, no question of the sufficiency of the evidence is before us. It insists further that appellants would not stand any better if their complaint on this score is taken as attacking not the failure to instruct a verdict but the nature of the proof employed by appellee in establishing its damages and the claimed incompetence of the testimony offered by it in support of its claim, for no reference is given in appellants' brief to, and a search of the record fails to disclose, the place or places in the record where such objections were made and overruled."

2. This question charges the Court of Appeals with error in failing to review any specification of error, since no timely objections were taken to rulings of the Trial Court. This question is entirely fallacious, in that the Court of Appeals did review this entire record, and did not discover error of any kind. In fact, the opinion of

Judge Hutcheson contains the following statement, quoted on page "7a" of the petition for a writ of certiorari:

> "In saying what we have said above, we do so with the full recognition that, notwithstanding appellants' failure to properly make and preserve grounds of error, this court can and will notice plain error either called to its attention by counsel or appearing to our own observation. Ft. Worth & Denver v. Harris, note 2, supra. Though, therefore, appellants in their brief do not point to a single instance in which the court, either without objection on their part or over their objections, has committed plain error, prejudicial in its nature and therefore reversible, because of the fact that appellants have briefed the case as though in this voluminous record there plainly appeared prejudicial errors of great magnitude, we have examined the record in the light of these complaints of the trial without discovering plain error of any kind."

3. This question charges the Court of Appeals with error in barring review of the refusal of the Trial Court to charge the requests of the petitioners and in the errors committed by the Trial Court in its charge to the Jury because no objections were taken thereto. As pointed out above, the Court of Appeals did examine the record in this case and did not discover any errors. In his scholarly fashion, the opinion of Judge Hutcheson quoted on page "7a" of the petition for a writ of certiorari states:

> "All that the record shows is that both parties, exercising a self-imposed restraint as remarkable as it is unusual in making objections and exceptions, each no doubt speculating on a jury verdict, have committed the trial of the case to the district judge without substantial objection or other form of interposition. Having thus chosen their course, it is too

late for the losing parties, after the speculation has turned out badly for them, to depart from it by seeking for the first time here to put the court in error and invalidate the results of this long trial by making large and unsupported claims of injury sustained by them, claims which were not made and preserved below.

In these circumstances, claims of the kind made here against the charge of the court and other matters, to which no objection was made or exception taken, are considered to be and are treated as afterthoughts."

4. This question charges the Court of Appeals with error respecting petitioners' specifications of errors, numbers 5, 7, 8 and 11. These are the same items referred to in question number "1", treated above. In addition to the reasons stated above, Judge Hutcheson's opinion overrules this contention on page "5a" of the petition for a writ of certiorari, in the following clear language:

"For reasons which we will state as briefly as possible, we find ourselves in substantial agreement with appellee's views that, in a brief and on a record which fails to point to specific objections sufficiently drawing the attention of the trial court to particular errors claimed and affording it opportunity to correct them, appellants seek to bring about here a general combing and review by us of the whole record to find, and reverse for, claimed errors not plain on the face of the record but lurking therein, not properly pointed out below or assigned here."

5. This question charges the Court of Appeals with error respecting the consistency of the verdict and the establishment of damages by the respondent. These items

will be treated more fully in Point III of this brief. In connection with the same, Judge Hutcheson's opinion made the following comment, on page "4a" of the petition for a writ of certiorari:

> "Finally, appellee, meeting head on the contentions appellants make, urges upon us that the facts of record fully support the actions of the court and jury throughout, and that a careful examination of the record will show that the evidence offered to sustain the damages awarded appellee is not only consistent with the tendered issues but in all respects conforms thereto. In short, it is appellee's position that while in the state of the record appellants have no right to impose upon this court the burden of searching the record for the errors appellants claim, such a search if made will disclose that there was ample evidence to support the verdict of the jury, and will establish that all that appellants are seeking to do here is to have this court retry issues of fact properly submitted to and as properly determined against them by the jury."

6. This question charges the Court of Appeals with error in failing to notice plain error which was allegedly committed by the Trial Court. As heretofore stated, the Court of Appeals discovered no plain error of any kind, nor was any pointed out by the petitioners. Judge Hutcheson's opinion concludes, on page "8a" of the petition for a writ of certiorari as follows:

> "Without, therefore, undertaking to discuss the voluminous evidence or trace the course of the trial, it is sufficient for us to say that neither assigned in the briefs nor plainly appearing on the face of the record has any reversible error been made to appear, and that the judgment appealed from must be affirmed."

7. This question charges the Court of Appeals with being inconsistent with the later decision made by it in the case of *Sydney Ginsberg* v. *U. S.* (not yet reported officially, and quoted in full on pages "9a" to "25a" of the petition for a writ of certiorari). In that case, the Court of Appeals granted a reversal and remand because of the offensive statements made by the United States district attorney. There was nothing inconsistent in that opinion with the one rendered in the instant case. The majority opinion in the *Ginsberg* case was careful to point out on page "17a" of the petition for a writ of certiorari, the basis and reason for the reversal and remand, as follows:

> "We hold that this statement of the prosecuting attorney constituted 'plain error(s) * * * affecting substantial rights' under Rule 52 (b) governing criminal procedure. It was such an error, also, as would have been magnified in its influence on the jury by an objection and motion for mistrial. It made it so unlikely that the appellant could be given a fair trial, as the term is understood in our jurisprudence, that we hold it to be reversible error. This makes it unnecessary to decide whether the other errors discussed would, standing alone, justify a reversal of the case."

POINT I

The jurisdiction of neither this Court nor the Court of Appeals has been invoked with regard to the judgment rendered in petitioners' (appellants') favor and said judgment is therefore final and cannot be attacked or disturbed.

There were two separate verdicts rendered by the Jury in the instant action (R. 173); and two distinct judgments entered thereon (R. 174-175, 176-177). The petitioners

herein filed a Notice of Appeal only from the judgment rendered against them (R. 184-185). Therefore, only that one judgment was before the Court of Appeals, and is now before this Court.

However, the petitioners persist in discussing in their petition the alleged errors of the Trial Court in limiting their damages, in connection with the judgment not being appealed. On page 8 of the petition for a writ of certiorari, the petitioners make the following statements:

> "* * * The trial court overruled these contentions and limited the petitioners' proof to the sixty day period.
>
> Of course, this tended to confuse the Jury as hereinabove indicated, and this was disclosed by the fact that the Jury returned on two separate occasions, and the colloquy between the Court and the Jury is contained in rather voluminous portions of the record which have been hereinabove referred to, and which seem to indicate quite overwhelmingly that the Jury had one theory of the case, which had been imparted to it in the posture in which the case was presented, and then, towards the end of the case the entire concept was radically revised, so that the jury was in doubt as to what damages it could or could not award to the appellants."

It is a basic and elementary rule of law, that an appellate court will only review a judgment for which a Notice of Appeal has been filed. It is equally well established that an appellate court will only consider on appeal the questions and issues which have been properly raised in accordance with the prevailing rules of procedure. These principles were well applied to the instant case by Judge Hutcheson in his opinion, when he stated on page "6a" of his opinion quoted in the petition for a writ of certiorari:

> "As to the claims of specifications one, two, and three, that the court erred in limiting plaintiffs' recovery to a sixty day period, we agree with appellee that the judgment in plaintiffs' favor was not appealed from and is not before us, and we agree with it, too, that if this view is incorrect, appellants would stand no better. For in respect to this matter the district court in his charge, by mention at least four times of the sixty day limitation, specifically and definitely limited plaintiffs' recovery on it to this period, the plaintiffs made no objection to the charge, and a litigant cannot, by remaining silent when he should speak, put the judge in error by afterwards complaining of his action."

This rule was also clearly and succinctly stated in *Tjoserig* v. *Donohoe*, 262 Fed. 911, 918 (C. C. A. 9—1920), as follows:

> "The appellees not having appealed from the decree awarding them affirmative relief, cannot review the denial of a portion of the relief which they sought. Sanborn-Cutting Co. v. Paine, 244 Fed. 672, 682, 157 C. C. A. 120; Laswell Land & Lumber Co. v. Lee Wilson & Co., 236 Fed. 322, 149 C. C. A. 454."

In *United States* v. *Hosteen Tse Kesi*, 191 F. 2d 518 (C. A. 10—1951), the Court was faced with a similar situation. The defendant had interposed a counterclaim. The Court dismissed the complaint and the counterclaim, and entered separate judgments of dismissal. Only the plaintiff served and filed a Notice of Appeal and only as to the judgment rendered dismissing the complaint. In his brief and argument, the counterclaim-plaintiff there sought to appeal the dismissal of the counterclaim. The Court did not permit such an appeal and said at page 521:

"The Trial Court dismissed the cross-complaint and the counterclaim upon the grounds that the Indian Claims Commission or the Court of Claims is the proper forum in which to seek money damages upon Indian claims and not the Federal District Court (citing statute). No appeal was taken from this order of dismissal and it may not be considered here (citing cases)."

See:

Bryant v. *Massachusetts Bonding & Insurance Co.*, 158 F. 2d 967 (C. A. 5—1946).

In the case now before this Court, no appeal was taken from one of the judgments, and consequently that judgment is not now before this Court for its consideration, and no action should be taken thereon. For these reasons, it is respectfully contended that this Court may not consider any questions or issues relating solely to the judgment rendered in favor of the petitioners, as that judgment has not been appealed from, and is final.

POINT II

No exceptions or objections were taken to the Charge of the Trial Court, thereby precluding the consideration thereof on any appeal.

At the conclusion of the Charge of the Court, the Trial Judge asked each side if there was anything further to add in connection with his instructions to the Jury. Counsel for both sides stated that there were no further requests and made no objections and took no exceptions on the record to the instructions given to the Jury by the Trial Court (R. 1011).

The same procedure was followed on each of the two occasions that the Jury returned for additional or further

instructions (R. 1020, 1023). In each instance, counsel for both sides agreed on the record that the additional statements or instructions of the Trial Court were fair and proper.

Accordingly, since no objections or exceptions were taken at any time during the trial to any of the instructions given by the Trial Court to the Jury, it is indeed too late to raise such points or issues for the first time before the Court of Appeals. The above reasoning is based primarily upon Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C. A. Said Rule reads as follows:

> "Rule 51; Instructions to Jury: Objection.
>
> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The petition for a writ of certiorari herein relies strongly on the case of *Shokuwan Shimabukuro* v. *Higegoshi Nagayama*, 140 F. 2d 13 (C. A. D. C.—1943). However, in that case, the Court was careful to point out that the power to notice error waived by the parties should be sparingly used. On page 15 of the opinion, the following appears:

> "Rule 51 of the new Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723 C, provides that no party may assign as error the giving

or failure to give an instruction unless he distinctly presents to the trial court his ground for objection. This conforms to the practice generally followed in appellate procedure everywhere. Hence the error in instructing the jury in this case cannot be raised by the defendant. If it can be considered at all it must be on motion of the court.

"The power of an appellate court on its own motion to consider grounds of eror not raised below is not one which should be exercised in an ordinary case[2]."

The footnote referred to in the above quotation, reads as follows:

"Mr. Justice Stone in Duignan v. United States, 1927, 274 U. S. 195 at page 200, 47 S. Ct. 566, at page 568, 71 L. Ed. 966, said: 'This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.'"

In *Troupe* v. *Chicago, D. & G. Bay Transit Co.*, 234 F. 2d 253, 259 (C. A. 2—1956) (cited on page 9 of the petition for a writ of certiorari), Circuit Judge Waterman, writing for the majority of the Court gave a scholarly analysis of the entire question of the necessity of taking objection to the Trial Court's charge. His opinion held:

"Rule 51 of the Federal Rules of Civil Procedure provides: '* * * No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection * * *.' The purpose of this salutary rule is to expedite the administration of justice by insuring that the trial judge is informed of possible errors so that he may have an opportunity to reconsider his charge, and if necessary to correct it (citing cases). While we recognize the discretionary power of an appellate

court in a proper case to review of its own motion errors not saved by proper objection (citing cases), we think this discretion should be exercised sparingly and only in exceptional cases. Without attempting to state a rule or delineate situations in which it would be proper to exercise this discretion in favor of an appealing party, we think the language in United States v. Atkinson, 1936, 297 U. S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555, and quoted with approval in Johnson v. U. S., 1943, 318 U. S. 189, 200, 63 S. Ct. 549, 87 L. Ed. 704, vividly calls to mind the type of situation in which we would be favorably disposed to review alleged errors despite the failure of the appealing party to raise his objections below: 'In exceptional circumstances especially in criminal cases, appellate courts in the public interest, may, of their own motion, notice errors to which no exception has been taken if the errors are obvious *or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.*' (Emphasis added.)"

In one of the leading cases on this subject, *Palmer* v. *Hoffman*, 318 U. S. 109, 119, 63 S. Ct. 477, 483, 87 L. Ed. 645, 653 (1943), this Court held the general rule to be as follows:

"* * * In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. See Lincoln v. Claflin, 7 Wall. 132, 139; Beaver v. Taylor, 93 U. S. 46, 54-55; Mobile & Montgomery Ry. Co. v. Jurey, 111 U. S. 584, 596; McDermott v. Severe, 202

U. S. 600, 611; Norfolk & W. Ry. Co. v. Earnest, 229 U. S. 114, 122; Pennsylvania R. Co. v. Minds, 250 U. S. 368, 375. That long standing rule of federal practice is as applicable in this type of case as in others. That rule cannot be avoided here by reason of the requested charge."

See also:

Pennsylvania R.R. Co. v. *Minds*, 250 U. S. 368, 39 S. Ct. 531, 63 L. Ed. 1039 (1919);

United States v. *Atkinson*, 297 U. S. 157, 56 S. Ct. 391, 80 L. Ed. 555 (1936);

Standard Oil Co. v. *Burelson*, 117 F. 2d 412 (C. A. 5—1941);

Western Fire Ins. Co. v. *Word*, 131 F. 2d 541 (C. A. 5—1942);

New York Life Ins. Co. v. *Schlatter*, 203 F. 2d 184 (C. A. 5—1953);

Curd v. *Todd-Johnson Dry Docks*, 213 F. 2d 864 (C. A. 5—1954);

American Fidelity & Casualty v. *Dreeler*, 220 F. 2d 930 (C. A. 5—1955);

Ft. Worth & Denver R.R. Co. v. *Harris*, 230 F. 2d 680 (C. A. 5—1956);

Indiviglio v. *United States*, 249 F. 2d 549 (C. A. 5—1957).

The case of *Boyd* v. *U. S.*, 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077 (1891) (cited on page 10 of the petition for writ of certiorari) is in no way applicable to the instant case. The *Boyd* case, *supra*, was a criminal case dealing with a murder charge where evidence of previous attempts of robbery by the defendant were allowed to be introduced. It is indeed far-fetched to even attempt to compare that situation to the instant one.

Likewise, the attempt of the petitioners to claim that the recent opinion in *Sydney Ginsberg* v. *U. S.* (quoted in

full in Appendix "B" of the petition for writ of certiorari) is inconsistent and irreconcilable with the opinion in the instant case is neither a fair nor accurate comment. The two opinions can easily and logically exist side by side. The *Ginsberg* case dealt with a criminal conviction for tax evasion, and as heretofore shown, the conviction therein was reversed and remanded because of the unfair and prejudicial statements made by the prosecuting attorney during that trial. In the instant case, the unanimous opinion of Judge Hutcheson makes it eminently clear that the Court is not unwilling to accept the doctrine of noticing plain error in a trial record, but that no such plain error is prevalent in the trial record of this case.

Therefore, under the rules and case law, as outlined above, relating to the necessity for objection or exception to instructions, it is unnecessary for this Court to even consider the unjust and unfounded criticisms by the petitioners of the Charge given in this case. Here, the petitioners also failed to make any objection after the Court had given clarifying instructions to the Jury.

Thus, the attempt of the petitioners to assign error (although without merit), construed in the light of their failure to take any exceptions or objections to the instructions of the Trial Court to the Jury, must be deemed to be mere afterthoughts. Accordingly, no part of the Trial Court's Charge is reviewable.

POINT III

The Trial Court was correct in its rulings concerning measure of damages, and the judgments in this case were entirely consistent and reconcilable.

The petition for a writ of certiorari herein claims that the Trial Court erred with respect to the proof of damages concerning the respondent's counterclaims. It is a well-

accepted principle that damages for breach of contract cannot always be determined exactly. In *Grand Trunk Western R. Co.* v. *H. W. Nelson Co.*, 116 F. 2d 823, 838 (C. A. 6—1941), this principle was clearly enunciated, as follows:

> "Determination of damages for breach of a contract is an inexact science and the sum reached by whatever method used will never be more than an approximation. This impossibility of precise determination is generally recognized and the law does not require mathematical certainty. Recognizing the evidential difficulties inherent in fixing damages to inflexible monetary terms, the law adjusts itself to the exigencies of the business world. In the case here, we are driven to ask the opinions of those having superior knowledge of rental value of machinery and equipment. It is difficult to lay down any exact rule with reference to the amount of knowledge a witness must possess before giving his opinion as to rental value and a determination of the question rests largely in the discretion of the trial judge. Montana Railway Company v. Warren, 137 U. S. 348, 354, 11 S. Ct. 96, 34 L. Ed. 681."

The petitioners attempt to take part of the written agreement between the parties and give it more importance than the other provisions thereof. The petitioners attempt to ignore their obligations and duties under the agreement. It is well established, that in the construction of a contract, resort must be had to all the words and terms thereof, as well as to the prevailing conditions under which the parties are operating. This thought is summed up very succinctly in *Koles* v. *Borough Park Co.*, 142 App. Div. 765, 769, 127 N. Y. Supp. 671, 674 (1st Dept.—1911), wherein it is stated:

> "In construing a contract the whole instrument must be considered, and from such consideration

a conclusion reached as to what the parties intended to do or sought to accomplish (O'Brien v. Miller, 168 U. S. 287, 18 Sup. Ct. 140, 42 L. Ed. 469; Woolsey v. Funke, 121 N. Y. 87, 24 N. E. 191)."

See also:

Merrill-Ruckgaber Co. v. United States, 241 U. S. 387, 36 S. Ct. 662, 60 L. Ed. 1058 (1916);
Buchanan v. Swift, 130 F. 2d 483 (C. A. 7—1942).

It must be borne in mind that the respondent here is in the business of renting its machinery and equipment. In this case, the machinery and equipment belonging to the respondent was on the job site for a period of over sixteen (16) months without the petitioners giving any consideration therefor whatsoever. In addition, when said machinery and equipment was finally returned by the petitioners to the respondent, there was found to be some lost, missing and badly damaged material. This was caused by the failure of the petitioners to properly care for and maintain said machinery and equipment, which was left unattended and unserviced in some of the worst possible types of climatic conditions.

The petitioners attempt to rely strongly on the case of *United States for Use and Benefit of Smith v. Maryland Casualty Co., et al.*, 146 F. 2d 379 (C. A. 5—1944). The petitioners quote a portion of a paragraph out of context. In that case, a contractor-lessee could not return equipment to a lessor because of an outstanding order of the Government. The Court held there that the contractor-lessee was obligated to pay the lessor since it had tied up the lessor's property for a period of time. The Court stated at page 380:

"This was not a contract in which a party could cast aside the incidents that were burdensome and hold fast to those which were advantageous. See,

> See. 444, 12 Am. Jur., p. 1027. For instance, one ordinarily would not be upheld in the assertion that he had canceled his obligation to pay rent on a house if thereafter he had voluntarily continued to live in it without the lessor's permission.
>
> "The contract with lessor required lessees to pay rent on or redeliver the tractors. * * * Where one of two innocent persons must suffer the burden should fall upon him who had it within his powers to have prevented it but failed to do so."

In fact, in the instant case, the petitioners even attempted to obtain an injunction to prevent the removal and return of the respondent's machinery and equipment. Under the terms of the agreement between the parties, the petitioners had the obligation as well as the duty to retu: the same to the respondent's yard in Long Island City, New York. Having failed to do so until January, 1956, the petitioners must be held liable and accountable for the reasonable rental value for the period of time that they withheld said machinery and equipment. At the same time, it must be noted that the mere leaving of machinery and equipment of this type unused, uncared for and unattended at the foot of Northeast 9th Street and Biscayne Bay, Miami, Florida, would do more harm and cause more deterioration and ruin than if said machinery and equipment had been used, properly cared for, oiled and maintained.

In other words, the agreement in the instant case is an "open-end" agreement, providing for rental to be paid until the machinery and equipment have been returned to the respondent. Since all the machinery and equipment was not returned to the respondent until January, 1956, the Trial Court was correct in permitting the Jury to render a verdict for the respondent, based in part upon the

fair and reasonable rental value of said machinery and equipment until its return. Such a verdict is both just and equitable and should not be changed.

The petitioners attempt to argue that the verdicts of the Jury and the judgments rendered thereon were inconsistent and irreconcilable. Even though the Jury in this case also gave a verdict in favor of the petitioners, it was perfectly consistent, fair and in accord with the evidence for them to also render the verdict herein in favor of the respondent. A complete reading of the unbiased, just and logical Charge of the Trial Court to the Jury will disclose that the Court contemplated and asked for two separate verdicts in this case. The same were necessary and essential because additional parties were involved and liable on the respondent's counterclaims.

The petitioners also attempt to argue that the verdict of the Jury in favor of the respondent was arithmetically not supportable. To further prove that this verdict is mathematically supported by the evidence in this case, we merely have to show a simple breakdown of the different possible rental periods. First of all, for the period from June 15, 1955 to January 13, 1956 (approximately seven (7) months), the Trial Court properly instructed the Jury that they had to find a reasonable rental against the petitioners and in favor of the respondent herein. June 15, 1955 was the date on which it was admitted at the trial that the petitioners took over full operation and control of the job and did not even consult with the respondent after that date. January 13, 1956 is the date the last shipment of machinery and equipment left the job site for its return by the petitioners to the respondent.

It would also have been perfectly proper and consistent for the Jury to have awarded reasonable rentals to the respondent for the period from February 18, 1955 to June

45, 1955 (approximately four (4) months). February 18, 1955 is an important date because it was at that time that the respondent's representatives requested and insisted that there be a realignment of the available equipment (R. 528-530). However, the petitioners refused to move and realign said equipment. As the best proof that such realignment would have dewatered the site at that time, we have the testimony of one, James Haley, the petitioners' own expert, who testified on page 431 of the trial record, as follows:

> "Q. If you had taken all of the equipment on the outside and placed it on the inside at that stage of the operation, would that, in your opinion, have dewatered this site by wellpoints? A. Yes. They were about 39,000 gallons per minute capacity."

Accordingly, if the above two periods were added together, the petitioners would be liable for reasonable rentals to the respondent from on or about February 18, 1955 to on or about January 13, 1956. This is a period of almost eleven (11) full months. At the agreed contract rental of $250 per day, the eleven months rental would, therefore, amount to approximately $82,500.00. Added to this should be approximately $20,000.00 proved for missing and damaged equipment, thus making a total of $102,500.00. However, when the petitioners are given the credit of $7,000.00 for grouting charges, a figure of $95,500.00 remains in favor of the respondents herein. With various minor adjustments in these figures, it is easily determined how the Jury actually arrived at a verdict of $94,957.75 in favor of the respondent herein.

Therefore, it must be concluded that there is nothing inconsistent or mathematically incorrect about the verdict rendered in favor of the respondent herein. In fact, a

careful analysis of the above dates and figures, in the light of the evidence adduced at this trial, shows that the said Jury verdict in favor of the respondent is both fair and proper. There exists absolutely no reason to reverse, modify or change said verdict.

CONCLUSION

For all of the reasons above set forth, it is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Respectfully submitted,

HARRY GROSSMAN,
Attorney for Respondent,
Office & P. O. Address,
545 Fifth Avenue,
New York 17, N. Y.